No. 19-60630

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORDÚA RESTAURANTS, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

CORRECTED BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board ("the Board") submits that this case does not require oral argument. This case involves the application of well-established legal principles to factual findings that are well supported by the record evidence. However, if the Court determines that oral argument would be of assistance, the Board respectfully requests the opportunity to participate.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Cordúa Restaurants, Inc. ("the Company") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Company on August 14, 2019, and reported at 368 NLRB No. 43. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended ("the Act"). 29 U.S.C. § 160(a). The Board's Order is final and

this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). Venue is proper because the Board found unfair labor practices that occurred in Texas. The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of its Order with respect to its uncontested finding that the Company violated Section 8(a)(1) of the Act by maintaining an overbroad no-solicitation rule?

2. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(1) of the Act by discriminatorily discharging employee Steven Ramirez?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations

The Company operates numerous food-service businesses in the Houston metropolitan area, including nine restaurants. (ROA.1833; ROA.1012.)[1] The Company's restaurants include "Artista" in downtown Houston, "Churrascos River Oaks," and "Churrascos Sugar Land." (ROA.1833; ROA.1012.) The Company

[1] "ROA" references are to the record on appeal. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

employs several hundred servers, busboys, and bartenders at its various restaurants. (ROA.1833; ROA.822.) The Company's upper management includes its human resources director, Patricia Quinonez, and chief operating officer, Fred Espinoza. (ROA.1833; ROA.382, 1012.)

B. The Company's No-Solicitation Rule

The Company maintains an employee handbook applicable to all of its restaurant employees. (ROA.1822; ROA.1422-56.) In relevant part, the handbook contains a list of prohibited conduct which is subject to the Company's corrective-action process, including: "[s]olicitation on company premises." (ROA.1834; ROA.1433.)

C. Ramirez Files a Collective-Action Lawsuit Against the Company

Employee Steven Ramirez began working for the Company in September 2012 as a server at the Churrascos River Oaks restaurant. (ROA.1839; ROA.26, 31.) After working for the Company for nearly two and a half years, Ramirez began noticing discrepancies in his paychecks causing him to believe he was not being properly paid for his hours. (ROA.1838; ROA.27-28.) Ramirez also began discussing similar concerns with his coworkers, which led him to contact an attorney about the issue. (ROA.1838; ROA.27-28.) Ramirez and his attorney concluded that the Company was paying employees at an hourly rate below

minimum wage, was improperly utilizing a tip credit against its minimum-wage obligations, and was failing to pay employees overtime. (ROA.1379-91.)

In January 2015, Ramirez filed a collective-action complaint against the Company in the U.S. District Court for the Southern District of Texas, on behalf of himself and other similarly situated employees. (ROA.1822; ROA.1379-91.) The complaint alleged various violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the Texas Minimum Wage Act, Tex. Lab. Code §§ 62.001 et seq. (ROA.1822; ROA.1379-91.) An initial complement of seven of Ramirez's coworkers signed forms in January to join the collective lawsuit. (ROA.1822; ROA.29, 1461-68.)

In March 2015, Ramirez transferred restaurants from Churrascos River Oaks to Artista. (ROA.1839; ROA.31-32.) Ramirez's managers at Artista included general manager Damian Ambroa and assistant manager Naomi Reichman. (ROA.1839; ROA.128, 822-23.) After Ramirez transferred to Artista, numerous Artista employees began asking him about his wage-and-hour lawsuit against the Company. (ROA.1839; ROA.34-35, 39.) Ramirez and his Artista coworkers discussed the lawsuit and their shared concerns about their paychecks and working hours, and Ramirez directed interested employees to his attorney. (ROA.1839; ROA.34-35, 217-18.)

In May 2015, the Company transferred Ramirez to its Churrascos Sugar Land restaurant, although he continued to work extra shifts at Artista. (ROA.1839; ROA.86-88.) At the new location, Ramirez reported to general manager Rigo Romero. (ROA.1839; ROA.1130.) Ramirez continued to act as the point person for the wage-and-hour lawsuit by discussing it with coworkers, answering their questions, and directing them to his attorney. (ROA.1839; ROA.39, 165.) By the end of June, sixteen of Ramirez's coworkers had signed on to the collective action, including five at Artista and one at Churrascos Sugar Land. (ROA.1404.)

D. The Company's General Managers Learn of Ramirez's Lawsuit; Reichman Calls Ramirez to Ask Him About the Lawsuit; Ambroa Seeks Out and Photographs Ramirez's Private Text Messages

In early July 2015, the Company held a meeting at which its human resources director, Quinonez, discussed the collective-action lawsuit with all of the Company's general managers, including Ramirez's general managers at Artista and Churrascos Sugar Land, Ambroa and Romero. (ROA.1838; ROA.838, 1140-41.) Shortly thereafter, Ambroa and Romero separately contacted Quinonez to inquire further about the lawsuit and to ask for a list of employees who had joined it at their respective restaurants. (ROA.1839; ROA.839, 1141.) Ambroa also learned from other employees that Ramirez was involved with the lawsuit. (ROA.1839; ROA.982-83.)

One evening in mid-July, Artista assistant manager Reichman called Ramirez upset and began asking him about the lawsuit. (ROA.1840; ROA.1207-13.) Reichman's husband, employee Eran Reichman, had recently been discharged by the Company, and Reichman wanted information from Ramirez about the lawsuit and whether she or her husband might qualify to join it. (ROA.1842; ROA.1209-11.) Ramirez offered to put Reichman and her husband in touch with the lawyer handling the lawsuit. (ROA.1842; ROA.1210.) During the course of their conversation, Ramirez separately asked Reichman if she could review his own payroll records to determine if his hours were correct. (ROA.1824; ROA.1213-15.) He did not ask her about payroll records for any other employee. (ROA.1842-43; ROA.108, 1213.)

Later in July, Artista general manager Ambroa used Reichman's password to access her personal cellphone, which she had left unattended in the restaurant's office. (ROA.1840; ROA.975-76.) After accessing Reichman's cellphone, Ambroa toggled to a screen showing a list of contacts with whom Reichman had recently exchanged text messages and previewing the most recent messages sent to or received from each of those contacts. (ROA.1843; ROA.975-76.) Ambroa deliberately opened Reichman's text-message exchange with a contact he knew to be Ramirez and scrolled up to view earlier messages sent between Reichman and Ramirez on their personal cellphones outside of work. (ROA.1843.) Ambroa then

used his own cellphone to photograph selected messages from the exchange and sent the photographs to the Company's chief operating officer, Espinoza. (ROA.1840; ROA.1033, 1481-85.)[2]

Shortly thereafter, Ambroa discharged Reichman for drinking on the job. (ROA.1840; ROA.132-33.) On the evening of July 26, Ambroa received a series of text messages from Reichman's number referencing her discharge and denying apparent allegations that she had helped Ramirez access confidential employee information. (ROA.1840; ROA.1486-95.) Ambroa immediately called Espinoza and forwarded him the messages. (ROA.1840; ROA.835-36, 1033.) Ambroa told Reichman to stop texting him, and the Company did not follow-up with Reichman regarding her messages. (ROA.1066, 1490.) Espinoza forwarded Reichman's messages to the Company's IT department and asked them to investigate whether any records had been taken. (ROA.1840; ROA.1041.) Approximately two weeks later, Espinoza received a response from the IT department concluding that it was "more than likely" no records had been taken. (ROA.1840; ROA.1042-43.) The Company made no attempt to question Ramirez about the issue in July or August. (ROA.1843; ROA.1046.)

[2] The photographs entered into evidence at the unfair-labor-practice hearing do not reflect the entire exchange between Reichman and Ramirez, and there are gaps between certain messages. (ROA.1214, 1217.)

Meanwhile, employees continued to join Ramirez's collective-action lawsuit, including three additional employees working at the Churrascos Sugar Land restaurant. (ROA.1841; ROA.1404.) As of the first week of September, nineteen employees had joined the lawsuit, each of whom was employed at one of the three restaurants where Ramirez was working or had recently worked. (ROA.1843; ROA.1404.) The nineteenth such employee joined the lawsuit on September 1. (ROA.1841; ROA.1404.) No employees from any of the Company's other six restaurants joined the lawsuit. (ROA.1404.)

E. The Company Interviews Ramirez and Then Discharges Him

On September 4, 2015, Espinoza called Ramirez into a one-on-one meeting at the Churrascos Sugar Land restaurant to question him about his communications with Reichman in mid-July. (ROA.1841; ROA.45-46, 1655-59.) Espinoza began by telling Ramirez, "We understand you have a lawsuit against us." (ROA.1655.) After assuring Ramirez that the Company respected his "right to do that," Espinoza explained that he was investigating allegations of improper access to employee personnel records. (ROA.1655.) Espinoza asked Ramirez a series of questions regarding whether he had sent text messages to Reichman about copying or deleting employee records. (ROA.1655-59.) Espinoza also asked Ramirez if he would provide access to his personal cellphone and, when Ramirez refused, asked him to put that refusal in writing. (ROA.1657.) Ramirez stated that he wanted to

contact his attorney before signing anything or putting anything in writing. (ROA.1657.) Ramirez generally asserted that he only texted Reichman about scheduling issues. (ROA.1655-59.)

The following week, on September 10, Espinoza called Ramirez into a second closed-door meeting, this time with Churrascos Sugar Land general manager Romero present. (ROA.1841; ROA.49-50, 1660-62.) Espinoza began by again stating that the Company was investigating a breach of confidential employee records, including personnel records and "some payroll and time records." (ROA.1660.) Espinoza asked Ramirez if he had anything to add to his answers from the previous interview. (ROA.1660.) When Ramirez stated that he did not, Espinoza claimed that the Company's investigation had "revealed that [Ramirez] worked with other employees that know [he] had access to employee records" and that Ramirez had been dishonest "about accessing employee records and about texting [Reichman]." (ROA.1660.) Espinoza concluded by discharging Ramirez for violating the Company's policies "by accessing confidential employee records," by encouraging another employee to access such records, and by lying to Espinoza about accessing such records. (ROA.1661-62.)

Less than three weeks after Ramirez's discharge, the Company promulgated a revised arbitration agreement requiring its employees to agree not to opt-in to collective actions. (ROA.1822.)

F. Ramirez Files Unfair-Labor-Practice Charges with the Board; the Board's Vacated April 2018 Decision and Order

Based on charges filed by Ramirez and other employees, the Board's General Counsel issued a final consolidated complaint in May 2016. (ROA.1830; ROA.1304-11, 1378.) Following a five-day evidentiary hearing, an administrative law judge issued a recommended decision and order finding, in relevant part, that the Company violated the Act by maintaining an overbroad no-solicitation rule and by discriminatorily discharging Ramirez in response to his protected concerted activities. (ROA.1830-56; ROA.8-1266.) The judge also addressed additional unfair-labor-practice allegations that, for reasons noted further below, are not at issue on review. (ROA.1830-56.)

On April 26, 2018, the Board (Members Pearce, McFerran, and Kaplan) issued a decision and order affirming in part the administrative law judge's recommended findings. (ROA.1821; ROA.1786-1818.) In particular, the Board agreed with the judge's conclusion that the Company violated Section 8(a)(1) of the Act by discriminatorily discharging Ramirez. (ROA.1821; ROA.1786-87.) The Company filed a petition for review of the Board's order with this Court. (ROA.1821.) Petition for Review, *Cordúa Rests., Inc. v. NLRB*, No. 18-60354 (5th Cir. May 10, 2018). However, in light of intervening Supreme Court precedent, the Board subsequently issued an order sua sponte vacating its decision and order. (ROA.1821; ROA.1819-20.) The Court granted an unopposed motion to dismiss

the Company' petition. Order Dismissing Petition, *Cordúa Rests., Inc. v. NLRB*, No. 18-60354 (5th Cir. Aug. 30, 2018).

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 14, 2019, the full Board (Chairman Ring and Members McFerran, Kaplan, and Emanuel; Member McFerran, dissenting in part) issued a Supplemental Decision and Order unanimously affirming the administrative law judge's finding that the Company violated Section 8(a)(1) of the Act by discharging Ramirez for engaging in protected concerted activities. (ROA.1821, 1824-26.) The Board also unanimously adopted the judge's finding that the Company violated Section 8(a)(1) by maintaining an overbroad no-solicitation rule in its employee handbook. (ROA.1822-23, 1825-26.)[3]

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (ROA.1826.) Affirmatively, the Board's Order requires the Company to: offer

[3] The unfair-labor-practice complaint alleged that the Company also violated Section 8(a)(1) by maintaining a variety of additional handbook rules, but the Board severed those allegations and retained them for further consideration in light of pertinent changes to Board law. (ROA.1825-26.) The Board dismissed the remaining unfair-labor-practice allegations, finding in particular that the Company's decision to discharge two other employees involved with the wage-and-hour lawsuit was not discriminatory, and that the Company's decision to promulgate a revised arbitration agreement requiring its employees to refrain from opting-in to class actions was lawful. (ROA.1821-25 & n.5.)

Ramirez full reinstatement to his former job or to a substantially equivalent position; remove from its files any reference to his unlawful discharge; make him whole for any loss of earnings and other benefits, including adverse tax consequences; and compensate him for search-for-work and interim employment expenses. (ROA.1826.) The Board's Order further requires the Company to: rescind the unlawful no-solicitation rule; furnish employees with handbook inserts advising that the unlawful rule has been rescinded or providing a lawfully worded provision, or distribute to employees a revised handbook containing a lawfully worded provision; and post a remedial notice. (ROA.1826.)

SUMMARY OF ARGUMENT

The only contested issue before the Court is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Steven Ramirez as a result of his statutorily protected conduct. It is undisputed that the Company was aware of Ramirez's public role as the lead plaintiff and point person for a growing collective-action lawsuit against the Company alleging wage-and-hour violations. After Ramirez filed the lawsuit in early 2015 and transferred twice between three of the Company's restaurants, a pattern emerged that wherever Ramirez worked he seemed to be recruiting more and more coworkers to join the collective action. As the Board reasonably found, the record shows that the Company and its managers exhibited increasing animus

toward Ramirez and his lawsuit, including by targeting Ramirez and accessing his private communications about the lawsuit under highly dubious circumstances. The record further supports the Board's central finding that Ramirez's protected conduct was at least *a* motivating factor in the Company's decision to discharge him after coworkers at his third restaurant continued to join the collective action.

In finding that the Company harbored animus toward Ramirez's protected conduct and that it acted pursuant to a discriminatory motive when discharging him, the Board relied not only on direct evidence of targeted animus, but also on considerable circumstantial evidence of suspicious circumstances surrounding the discharge. Such evidence includes the proximity in time between Ramirez's discharge and ongoing developments in the collective action, the Company's illogical and internally inconsistent response to what it later claimed were concerns about his fitness as an employee, and the Company's sham investigation into purported misconduct that it ultimately used as an excuse to discharge him.

In addition, the Board bolstered its finding of discriminatory motive by finding that the Company's stated justifications for discharging Ramirez were pretextual. Substantial evidence again supports the Board's determination that none of the Company's contemporaneous allegations—that Ramirez had accessed confidential employee records, had attempted to do so, or had lied about doing so—were genuine reasons for its decision to discharge him. And insofar as the

Board reasonably found that Ramirez's protected conduct was at least one factor motivating his discharge, the Company possessed an evidentiary burden to not merely identify some form of actual misconduct but to affirmatively prove that it would have discharged him in the absence of his protected conduct. The Company failed to do so before the Board, and it has failed to call the Board's findings into question on review.

Instead, the Company's brief is largely premised on misrepresentations of the Board's decision and of Ramirez's conduct as an employee. In particular, the Company repeatedly portrays Ramirez as a dishonest thief who attempted to steal confidential information, when in reality the Board found that he did no such thing. The Board observed that that the most the Company would have even arguably had cause to believe is that he merely asked one of the Company's own managers, Reichman, whether she could verify other employees' wage information for him. Under the deferential standard of review that the Court affords to the Board in cases such as this one, there is more than sufficient evidence to support the Board's unanimous finding that the Company violated the Act by discharging Ramirez.

STANDARD OF REVIEW

The Court will enforce the Board's decision if it is reasonable and supported by substantial evidence on the record as a whole. *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007); *see* 29 U.S.C. § 160(e);

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Substantial evidence means the degree of evidence which "*could* satisfy a reasonable factfinder." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (emphasis in original). The Court will not "reweigh the evidence, try the case de novo, or substitute [its] judgment for that of the Board." *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656-57 (5th Cir. 2012) (citation omitted). The Court gives special deference to the Board's credibility determinations and will uphold such determinations unless "inherently unreasonable or self-contradictory." *Id.* at 665; *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339-40 (5th Cir. 1993). The Court will only conclude that a finding of fact made by the Board is unsupported by substantial evidence in "the most rare and unusual cases." *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208 (5th Cir. 2014). Similarly, reasonable inferences drawn by the Board from its findings of fact will not be displaced by the Court, even if the Court might have reached a different conclusion had the matter been before it de novo. *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 551-52 (5th Cir. 1989); *see NLRB v. Link-Belt Co.*, 311 U.S. 584, 597 (1941).

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of Its Order with Respect to Its Uncontested Finding That the Company Violated Section 8(a)(1) of the Act by Maintaining an Overbroad No-Solicitation Rule

As an initial matter, the Company has failed to challenge one of the Board's unfair-labor-practice findings and the Board is therefore entitled to partial summary enforcement. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with" or "restrain" employees in the exercise of their statutory rights. 29 U.S.C. § 158(a)(1). The Board reasonably found that the Company violated Section 8(a)(1) by maintaining an overbroad handbook rule prohibiting its employees from engaging in "solicitation on company premises," which bans all solicitation regardless of when it occurs. (ROA.1825-26, 1834-35.) *See, e.g.*, *Fla. Steel Corp. v. NLRB*, 529 F.2d 1225, 1230-31 (5th Cir. 1976) ("In the absence of special circumstances, a no-solicitation rule applicable to employees during their non-working time is an unlawful interference with their right to discuss self-organization among themselves."); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616-21 (1962). By failing to address the violation in its opening brief, the Company has waived any argument challenging the Board's unfair-labor-practice finding. *El Paso Elec.*, 681 F.3d at 658. The Board is entitled to summary enforcement of those portions of its Order remedying the uncontested violation. *Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008).

II. Substantial Evidence Supports the Board's Finding That the Company Violated Section 8(a)(1) of the Act by Discriminatorily Discharging Employee Steven Ramirez

Section 7 of the Act guarantees employees the "right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. An employer violates Section 8(a)(1) by discharging an employee for engaging in protected concerted activities within the meaning of Section 7, or in an attempt to prevent such activities among its employees in the future. *See Remington Lodging & Hosp., LLC v. NLRB*, 847 F.3d 180, 186 (5th Cir. 2017); *Dish Network, LLC*, 363 NLRB No. 141, 2016 WL 850920, at *1 n.1 (Mar. 3, 2016), *enforced*, 725 F. App'x 682 (10th Cir. 2018). In cases where a Section 8(a)(1) violation turns on employer motivation, the Board applies its *Wright Line* framework. *See New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 600-01 (5th Cir. 2000) (citing *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-04 (1983) (affirming Board's *Wright Line* framework).

Pursuant to *Wright Line*, an employee's discharge violates the Act if the employee's protected conduct was a motivating factor in the decision to discharge the employee. 251 NLRB at 1089. The Board does not need to find that the employee's protected conduct was "*the sole* motivating factor," as long as it was

"*a* substantial or motivating factor." *Adams & Assocs., Inc. v. NLRB*, 871 F.3d 358, 370 (5th Cir. 2017) (emphases added). Because an employer "rarely admits" that it discharged an employee for engaging in statutorily protected conduct, the Board may rely on circumstantial evidence to infer the existence of an unlawful motive. *Elec. Data Sys. Corp. v. NLRB*, 985 F.2d 801, 804-05 (5th Cir. 1993); *see Remington Lodging*, 847 F.3d at 184 n.13. In particular, the Board may infer a discriminatory motive where the evidence shows that: (i) the employee engaged in protected conduct; (ii) the employer had knowledge of that conduct; and (iii) the employer harbored animus toward the employee's protected conduct. *Remington Lodging & Hosp., LLC*, 363 NLRB No. 112, 2016 WL 612706, at *2 & n.5 (Feb. 12, 2016), *enforced*, 847 F.3d 180 (5th Cir. 2017). If the Board finds an unlawful motive, the employer may only avoid an unfair-labor-practice finding by proving, as an affirmative defense, that it would have discharged the employee even in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 401-02; *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 313 (5th Cir. 1988).

Once the Board has found an employee's protected conduct to be a motivating factor for his or her discharge and has rejected the employer's affirmative defense, this Court will "not lightly displace the Board's factual finding of discriminatory intent." *Tex. World Serv. Co. v. NLRB*, 928 F.2d 1426, 1435 (5th Cir. 1991). The Board's assessment of a violation pursuant to the *Wright Line* is

ultimately a finding of fact, and thus the Court's role is "merely [to] determine whether substantial evidence on the record as a whole supports the Board's finding." *Id.*; *see also* 29 U.S.C. § 160(e); *Universal Camera*, 340 U.S. at 488. The Court will not disturb the Board's finding of unlawful motive even if the record would permit a "competing, perhaps even equal, inference of a legitimate basis for discipline," as long as the Board "could reasonably infer an improper motivation." *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 937 (5th Cir. 1993); *see Remington Lodging*, 847 F.3d at 186 & n.22 (noting that the Court will "not lightly displace the Board's factual finding of discriminatory intent").

A. It Is Undisputed That Ramirez Engaged in Various Protected Concerted Activities by Spearheading the Collective Lawsuit Against the Company

The Board found that Ramirez engaged in a variety of protected concerted activities within the meaning of Section 7 of the Act, and that the Company was specifically aware of such activities at the time of Ramirez's discharge. (ROA.1824-25.) The Company does not contest those findings on review. *See Flex Frac Logistics*, 746 F.3d at 208 (holding that a party "abandons all issues not raised and argued in its *initial* brief on appeal," and that such party may not raise new arguments in its reply brief).

The Board initially found that Ramirez engaged in protected concerted activity by discussing issues related to wages and hours with coworkers at several

of the Company's restaurants, and by answering coworkers' questions while acting as the point person for the collective lawsuit alleging minimum-wage and overtime violations. (ROA.1824, 1842-43.) It is well established that employees have a statutory right to discuss matters of common concern among themselves, which includes the "right to discuss wages." *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990); *see Flex Frac Logistics*, 746 F.3d at 209-09 (observing, in context of unlawful handbook rule, that wage-related discussions are protected). The Board has long recognized that employees' wage-related discussions are the "grist on which [future] concerted activity feeds." *Parexel Int'l, LLC*, 356 NLRB 516, 518-19 (2011).

The Board next found that Ramirez engaged in protected concerted activity by formally initiating and participating in the collective-action lawsuit. (ROA.1824-25, 1838.) In filing the lawsuit, Ramirez concertedly joined together with his coworkers to pursue legal claims against the Company aimed at improving their terms and conditions of employment. Since the earliest years of the Act, the Board and the courts have consistently held that employees engaged in such conduct are statutorily protected from retaliation. *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under [Section 7 of the Act] unless the employees acted in bad faith."); *see, e.g.*, *Le Madri Rest.*, 331 NLRB

269, 275-79 (2000) (finding discriminatory discharges in retaliation for protected filing of collective wage-and-hour lawsuit); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942) (same).[4]

The Board found that Ramirez also engaged in protected conduct when he requested access to his own payroll records in order to help verify the Company's compliance with state and federal minimum-wage laws. (ROA.1824.) *See Faurecia Exhaust Sys., Inc.*, 355 NLRB 621, 622 (2010) (finding that requests for information related to protected conduct are also protected). Although Ramirez's request was made individually, it was a "logical outgrowth" of his prior protected wage-related discussions with coworkers and his collective wage-and-hour lawsuit, and therefore it was also statutorily protected. *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238-40 (5th Cir. 1999); *see, e.g.*, *Blue Circle Cement Co. v. NLRB*, 41 F.3d 203, 206-09 (5th Cir. 1994) (affirming that individual employee

[4] The Board's uncontested finding that Ramirez's concerted filing of a collective-action lawsuit was protected is consistent with its separate finding, not at issue on review, that the Company did not violate the Act by subsequently requiring its employees to sign agreements committing them to resolve employment-related claims through individual arbitration. (ROA.1822-23.) Both findings are also consistent with this Court's precedent. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356-58, 361-62 (5th Cir. 2013) (recognizing that concerted participation in lawsuit may constitute protected conduct under the Act, but holding that employers may require employees to arbitrate claims individually because employees are not statutorily guaranteed a "substantive right" to a particular procedure or forum); *see also Convergys Corp. v. NLRB*, 866 F.3d 635, 639-40 (5th Cir. 2017) (extending same reasoning to uphold similar waiver of class procedures).

engaged in protected activity by using company photocopier to assist union campaign against employer practices).[5]

Finally, it is undisputed that the Company had actual knowledge of all of Ramirez's protected concerted activities, including from his public role as the lead plaintiff in the wage-and-hour lawsuit, from its managers' conversations with other restaurant employees, and from its documentation of an off-work text-message exchange regarding the lawsuit. (ROA.1839-42.)

B. The Board Reasonably Found That the Company's Decision To Discharge Ramirez Was Motivated, at Least in Part, by His Protected Concerted Activities

Substantial evidence supports the Board's further findings that the Company exhibited animus toward Ramirez and his protected concerted activities and that those protected activities were a motivating factor in the Company's decision to discharge Ramirez. (ROA.1825, 1842-44.) The Board relied on both direct and circumstantial evidence of animus, including the actions of Ambroa and Espinoza, to infer that the Company's hostility toward Ramirez's role in spearheading the wage-and-hour lawsuit was a consideration underlying the Company's decision to

[5] As discussed below, pp. 43-46, the Board found as a factual matter that Ramirez never asked Reichman for other employees' wage information. (ROA.1824-25, 1842-44.) Thus, contrary to the Company (Br. 28-30), the Board's decision does not rest on a finding that such request would have been statutorily protected.

discharge him with no prior warning and after a sham investigation into highly questionable allegations of speculative misconduct.

1. The Company's managers exhibited targeted animus toward Ramirez and his protected conduct, which supports an inference of discriminatory motive

In support of its finding that Ramirez's protected conduct was a motivating factor in the Company's decision to discharge him, the Board relied in part on evidence that the Company exhibited overt animus toward the collective-action lawsuit initiated by Ramirez and toward his ancillary protected conduct. (ROA.1824-25, 1842-43.) The Company's animus was initially shown through the actions of the general manager at the Artista restaurant, Ambroa, who inexplicably singled out Ramirez in order to review and photograph off-work communications that related in part to Ramirez's ongoing protected conduct. In addition, the Company's animus was further shown through the actions of its chief operating officer, Espinoza, who later interrogated Ramirez in a manner that went beyond what the Company claims was an investigation into purported misconduct.

Under dubious circumstances, Ambroa chose to open, scroll through, and photograph personal text messages between Ramirez and Reichman that plainly focused on the wage-and-hour lawsuit and Ramirez's known role as the lawsuit's point person. (ROA.1843.) This Court has long recognized that illicit surveillance of protected conduct "indicates an employer's opposition to [that conduct], and the

furtive nature of the snooping tends to demonstrate spectacularly the state of the employer's anxiety." *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 104 n.7 (5th Cir. 1963); *e.g.*, *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 712-14 (2005) (finding animus based on employer's surveillance of private meeting outside work at which employees discussed wage concerns), *enforced*, 456 F.3d 265 (1st Cir. 2006); *Transp. Repair & Serv., Inc.*, 328 NLRB 107, 111, 113 (1999) (finding animus based on supervisor's unexplained decision to single out union supporter and photograph his work product as though "looking for a reason to discharge him").

Ambroa was deceitful at the unfair-labor-practice hearing about how he came to view the text messages from Ramirez—which occurred shortly after he had learned that Ramirez was leading the wage-and-hour lawsuit—and, as the Board explained, the Company's suspect acquisition of the messages "raises more questions than it answers." (ROA.1843.) Ambroa testified without corroboration that Reichman generally granted him access to her personal cellphone in order for him to make work-related calls due to his own phone's poor reception in the restaurant, but he was evasive about whether he understood such access to encompass searching through her private text messages. (ROA.827, 976.) Ambroa admitted that after accessing Reichman's cellphone on the day in question he affirmatively toggled to the screen showing all of Reichman's contacts and previewing parts of her most recent text messages to or from those contacts, but he

did not explain why he did so. (ROA.975-76.) Ambroa then claimed that he only opened Reichman's text exchange with Ramirez because he saw on the preview screen that the two "were mentioning [his name]." (ROA.975-76.) That is demonstrably false. The most recent (lowest listed) messages in the photographs taken by Ambroa, which would have appeared on the preview screen at the time, were sent by Reichman to Ramirez about an apparently unrelated scheduling issue. (ROA.1485.) Even assuming that an earlier message referencing Ambroa had been the most recent message sent, it was too lengthy for Ambroa's name to have appeared on the abbreviated preview screen. (ROA.1484-85 ("Anyway I'm going to sleep.. Keep in touch with email tomorrow because I leave my phone on the desk and Damian knows you started this and I don't want him to know.").) Instead, as the Board found, Ambroa must have "purposely" targeted Reichman's off-work communications with Ramirez by looking through her contacts and affirmatively opening her text exchange with Ramirez, before scrolling up to view messages pertaining to Ramirez's protected conduct. (ROA.1843.)[6]

Ambroa's unusual and unexplained decision to deliberately seek out and review Reichman's text messages with Ramirez in particular, shortly after learning of Ramirez's protected concerted activities, demonstrates animus. *See, e.g.*,

[6] Ambroa admitted at the unfair-labor-practice hearing that he knew that Ramirez and Reichman were "talking about the lawsuit" in the messages he read and photographed. (ROA.830.)

Parsippany Hotel Mgmt. Co. v. NLRB, 99 F.3d 413, 423-24 (D.C. Cir. 1996) (affirming that employer's out-of-the-ordinary and targeted surveillance of union supporters "classically evidenced" animus motivating subsequent discharge). That is true even assuming, for the sake of argument, that after having viewed the messages Ambroa was justified in photographing what he considered to be evidence of misconduct. Indeed, Ambroa's targeted surveillance of Ramirez constitutes particularly significant evidence of animus, because the Company later relied on Ambroa's resulting allegations of misconduct to invent a pretextual reason for discharging Ramirez. *Cf. Dynasteel Corp. v. NLRB*, 476 F.3d 253, 256, 258-59 & n.3 (5th Cir. 2007) (rejecting employer's defense and affirming unlawful motive where supervisor provided "dubious at best" explanation for spying on employee at off-premises union meeting and then relying on pretextual claim of misconduct arising from such surveillance).

The Company further demonstrated animus toward the wage-and-hour lawsuit in early September when its chief operating officer called Ramirez into a one-on-one meeting and interrogated him about his communications with Reichman. (ROA.1842-43.) Even assuming that Espinoza was justified in asking Ramirez about the purported transfer of confidential information, the scope of the questioning went far beyond that objective. Instead, Espinoza broadly insisted that Ramirez reveal whether he had ever texted Reichman about *any* non-scheduling-

related matter. (ROA.1656-57.) Espinoza also attempted to pressure Ramirez into providing access to his personal cellphone, and refused Ramirez's requests to contact his attorney before proceeding. (ROA.1656-57.) Espinoza took such approach despite having actual knowledge from Ambroa's photographs that, separate and apart from any purported transfer of confidential records, Ramirez and Reichman had been discussing the lawsuit and the potential participation of Reichman or her husband. (ROA.1481-85.) Accordingly, the Board reasonably inferred that Espinoza's approach to questioning Ramirez was not innocently designed to "find the truth" about purported misconduct, but instead was meant, at least in part, to coercively probe Ramirez about the growing collective action. (ROA.1842.) *See, e.g.*, *Delta Gas, Inc.*, 282 NLRB 1315, 1315 n.1, 1317, 1322-23 (1987) (finding unlawful animus based on coercive questioning of employees about their visit to attorney's office to discuss possible wage-and-hour lawsuit).[7]

[7] Ambroa's surveillance of Ramirez's text messages and Espinoza's interrogation of Ramirez were alleged as separate unfair labor practices on the final day of the unfair-labor-practice hearing. (ROA.1831.) The administrative law judge denied a motion to amend the complaint in relevant part, finding that the allegations were untimely. (ROA.1833.) However, as this Court has held, acts displaying the "animus of the company and its supervisors . . . , although not alleged as independent violations, [are] relevant in assessing the violations that were alleged." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 767 (5th Cir. 1978); *see Vico Prods. Co.*, 336 NLRB 583, 588 (2001), *enforced*, 333 F.3d 198 (D.C. Cir. 2003). The underlying conduct remained relevant to the original allegation that Ramirez was discriminatorily discharged, and, as noted, the Board relied in part on the actions of Ambroa and Espinoza to find animus and unlawful motivation. (ROA.1840-44.)

2. The timing of Ramirez's discharge supports an inference of discriminatory motive

One of the most "[s]ignificant indicators" of unlawful motive is the timing of the employer's actions in relation to an employee's protected concerted activity and the employer's knowledge thereof. *NLRB v. ADCO Elec., Inc.*, 6 F.3d 1110, 1118 n.6 (5th Cir. 1993); *see Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 465 (5th Cir. 2001) (describing proximity in time as the "strongest form of circumstantial evidence"). As the Board found, the timing of Ramirez's discharge supports an inference of unlawful motive, as does the timing of certain events leading up to the discharge. (ROA.1842-43.)

Ramirez continued to engage in protected conduct and his coworkers continued to join the wage-and-hour lawsuit up until just days before his termination in September. By the time of the Company's decision to terminate Ramirez, a pattern had clearly emerged that "wherever Ramirez worked, more employees joined the [collective] action." (ROA.1843.) Indeed, participation in the lawsuit was limited to the three restaurants at which Ramirez worked or had recently worked. (ROA.1404.) Prior to Ramirez's first transfer in March, six employees at the Churrascos River Oaks restaurant had signed forms indicating their desire to join the lawsuit. (ROA.1404, 1462-68.) Within one month of his transfer to Artista, four employees at that restaurant had joined the lawsuit. (ROA.1404.) After his second transfer and prior to his discharge, four employees

at the Churrascos Sugar Land restaurant joined the lawsuit, with the fourth joining just three days before Espinoza finally decided to interview Ramirez about purported misconduct that had allegedly occurred nearly two months earlier. (ROA.1404.) The proximity in time between Ramirez's termination and ongoing developments in his wage-and-hour lawsuit indicates an unlawful motive, particularly when juxtaposed with the comparative lack of proximity in time between Espinoza's investigation and Ramirez's purported misconduct.[8]

The Board's findings are bolstered by the close proximity in time between the events precipitating Ramirez's termination and his managers' discovery of the scope of his protected concerted activities. Although the Company itself had notice of Ramirez's role as the initial plaintiff in the wage-and-hour lawsuit as early as January, the Company maintains that Ramirez's general managers at Artista and Churrascos Sugar Land, Ambroa and Romero, did not learn of his central involvement until July. Shortly after learning of the lawsuit, both Ambroa and Romero separately asked Quinonez for a list of participating employees at

[8] Given that Ramirez was the originator, lead plaintiff, and active point person for the wage-and-hour lawsuit, the Company's observation that other employees who merely joined the lawsuit were not terminated (Br. 20) has little relevance. *See, e.g.*, *Delta Gas*, 840 F.2d at 312 (explaining that an employer cannot undermine a finding that it harbored animus toward an employee "prominently involved" in protected conduct by noting that other employees were allowed to participate in protected activities without being discriminated against).

their respective restaurants.[9] Around the same time, Ambroa also began to hear from other Artista employees that Ramirez was playing a central role. Shortly after learning about Ramirez's protected conduct, Ambroa deliberately sought out Ramirez's private, off-work communications and sent photographs of text messages relating to the lawsuit to Espinoza.

The Company's assertion (Br. 24-25) that there was a "lengthy time gap" between Ramirez's protected activity and his discharge is without merit. The cases cited by the Company (Br. 24-25) are inapposite, because in each there was a significant lapse in time between the employee's *last* discrete instance of protected conduct and his or her subsequent discipline. *E.g.*, *Valmont Indus.*, 244 F.3d at 465 (emphasizing lack of evidence that employer knew of second organizing drive at time of disputed disciplinary warnings, and noting that only other instance of protected activity had concluded ten months earlier).[10] By contrast, although

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[9] The Company never persuasively explains why Ambroa or Romero had cause to ask for such a list. The claim that Ambroa needed the information "to confirm [employees'] payroll was being done correctly to avoid incurring any additional wage liability" (Br. 21) is dubious, unless the Company is suggesting it had no interest in whether it was violating wage-and-hour laws for those employees who had *not* joined the lawsuit.

[10] Contrary to the Company's citation, the Board did not consider the timing of the employee's state-court lawsuit in *Central Valley Meat Co.*, 346 NLRB 1078, 1079 & n.8 (2006), because it was not alleged as protected conduct. Although inapposite in any event, the administrative law judge's decision in *New York Hospital* is without precedential value because no exceptions were filed with the Board. Case No. 29-CA-136515, 2016 WL 555915 (Feb. 11, 2016).

Ramirez began his protected concerted activities as early as January, he continued to actively engage in protected conduct and his coworkers continued to join his collective-action lawsuit up until just days before his discharge in September. The distinction is aptly illustrated by this Court's opinion in *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295 (5th Cir. 1984). In that case, the Court held that there was insufficient evidence of a causal connection between the employee's discharge and a discrete job action he had participated in six months earlier. *Id.* at 299. However, the Court affirmed the Board's finding, based on circumstantial evidence, that the employee's discharge was motivated by his ongoing safety-related complaints. *Id.* Those complaints had *begun* at the same time as the job action but had continued throughout the next six months and had started to increasingly irritate the employer up through the very day of the employee's pretextual discharge. *Id.*; *see also Great Falls White Truck Co.*, 186 NLRB 690, 694 (1970) (finding animus where employee's cumulative protected activities finally pushed employer to "breaking point," when employer began discriminating against employee in manner culminating in discharge just days after final protected action), *enforced*, 452 F.2d 608 (9th Cir. 1971).

Moreover, although seven employees had privately signed on to Ramirez's lawsuit as early as January, the Company itself argued before the Board that it was unaware of the scale of the concerted activity until written consent forms were

formally filed with the district court near the beginning of May. (ROA.1246, 1461-68.) Prior to that date, the Company only had notice that Ramirez himself was involved, which naturally would have caused the Company less consternation than the knowledge that he was successfully recruiting more and more coworkers to join an expanding collective action. After another wave of eight employees joined in mid-June (ROA.1404), Quinonez held a meeting about the lawsuit with the Company's general managers in early July. Within weeks of that meeting, Ambroa had produced, under dubious circumstances, purported evidence of terminable misconduct by Ramirez. The number of employees participating in the collective action only continued to grow during the remainder of Ramirez's employment. In the end, the Company terminated Ramirez roughly four months after it first received formal notice of other employees joining his wage-and-hour lawsuit, in the midst of ongoing protected concerted activities and a growing collective action against the Company. *See NLRB v. Brookwood Furniture*, 701 F.2d 452, 464-65 (5th Cir. 1983) (affirming that timing of discharge, which occurred four months after union organizing campaign and while administrative election objections were still pending, supported inference of animus).[11]

[11] Although lawful, it bears noting that less than three weeks after Ramirez's discharge, the Company further demonstrated its concern about the growing collective action by promulgating a revised arbitration agreement requiring its employees to agree not to opt-in to such collective actions. (ROA.1822.)

3. The Company's internally inconsistent response to Ramirez's purported misconduct supports an inference of discriminatory motive

The Board may also rely on "inconsistencies between the employer's proffered reason for the discipline and other actions of that employer" as evidence of animus and unlawful motivation. *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 565 (5th Cir. 2003); *accord Airgas USA, LLC v. NLRB*, 916 F.3d 555, 562-63 (6th Cir. 2019). Thus, for example, the Sixth Circuit recently affirmed the Board's inference of animus where the employer's manager claimed he was concerned about safety issues when disciplining a driver, yet had made no contemporaneous efforts to stop the employee from continuing to drive an unsafe vehicle. *Airgas USA*, 916 F.3d at 562-63. Likewise in the present case, the Board observed that the Company's professed concerns about Ramirez's fitness as an employee, particularly with respect to handling confidential information, are contradicted by its deliberate failure to speak with Ramirez or to assess his continued access to sensitive data for nearly six weeks. (ROA.1843.)

At the unfair-labor-practice hearing, Espinoza claimed that the reason the Company felt compelled to interview Ramirez was to ascertain his trustworthiness as an employee because, as a server, he frequently interacted with customers, handled cash, and had access to credit-card information. (ROA.1067-68.) The Company continued to emphasize those purported misgivings before the Board.

(ROA.1843.) Yet, as the Board observed, the Company's professed concern about Ramirez's honesty cannot be plausibly reconciled with the fact that, after receiving Ambroa's allegations in July, Espinoza waited nearly six weeks to interview Ramirez and, shortly thereafter, to summarily discharge him. (ROA.1843-44.) During that interval, the Company took no action regarding Ramirez's access to cash and customer information, despite claiming to have considered Ramirez's text messages with Reichman very "troubling" in late July. (ROA.1028.) Ramirez continued to work through the entire month of August, which Espinoza stated was among the busiest times of the year with a high volume of customer interactions. (ROA.1843.)

The Company has not convincingly refuted the Board's findings regarding that inconsistency. The implication that Espinoza was waiting for the conclusion of a thorough, multiweek IT investigation into whether documents were actually taken before confronting Ramirez (Br. 12, 34-35) fails to explain why the Company would have let Ramirez continue to handle sensitive data. It also has little basis in the record. At the unfair-labor-practice hearing, Espinoza testified that after forwarding Ambroa's photographs to the Company's IT department in late July, he received the results of their investigation within "a couple of weeks or so, give or take." (ROA.1041-45.) His only explanation for the additional weeks of delay was the vague assertion that he was "busy" during August. (ROA.1046.)

That is not a compelling claim in light of the Company's subsequent portrayal of Ramirez as a "thief" who had to be terminated immediately. Moreover, as the interview transcripts demonstrate, Espinoza's meetings with Ramirez only took several minutes. (ROA.1655-62.) The Company had already concluded the previous month that no confidential records had actually been taken, and the Company has not identified how or why it would have taken Espinoza significant time to prepare for an interview with Ramirez.

In the absence of a convincing explanation, the Company misrepresents the Board's analysis by suggesting that the Board found fault with the Company's failure to immediately *suspend* Ramirez, or that it could only have satisfied the Board by doing so. (Br. 36-37.) To the contrary, the issue is not that the Company failed to promptly discipline Ramirez, but that its actions demonstrated a total lack of urgency about actually investigating what it has since claimed was an overriding concern about Ramirez's fitness to handle sensitive information and his status as a "thieving employee" (Br. 28). The Company chose not to interview Ramirez until more and more of his coworkers—primarily from Ramirez's new workplace, Churrascos Sugar Land—joined the growing collective action. Espinoza decided to interview Ramirez just three days after a fourth Churrascos Sugar Land employee signed on to the lawsuit, about purported misconduct that had allegedly occurred nearly two months earlier. (ROA.1404.)

4. The Company's failure to conduct a meaningful investigation into Ramirez's purported misconduct supports an inference of discriminatory motive

Substantial evidence also supports the Board's finding that the Company's overall investigation was not designed to determine whether any confidential employee records had been taken but was, instead, "an effort to find another reason to terminate Ramirez." (ROA.1843-44.) As this Court has recognized, an employer's flawed or one-sided investigation into an employee's purported misconduct may constitute "significant" evidence of unlawful motive. *Esco Elevators*, 736 F.2d at 299 & n.5; *accord Valmont Indus.*, 244 F.3d at 466-67. The full extent of the Company's investigation in the present case was to ask its IT department whether it appeared that any employee records had been taken and, after learning that more than likely none had, to inexplicably wait another several weeks before briefly interviewing Ramirez and presenting him with misleading questions asking him to admit to misconduct that had not occurred.

Espinoza's questioning displayed a suspicious lack of interest in actually learning from Ramirez whether there had been an attempt to access confidential records. For example, after Espinoza referenced the wage-and-hour lawsuit and Ramirez made clear that he was uncomfortable putting anything in writing without contacting his lawyer first, Espinoza made no attempt to accommodate Ramirez or to facilitate the possibility of learning what Ramirez knew about the matter.

(ROA.1655-59.) Instead, Espinoza quickly moved through a checklist of questions and simply asked Ramirez to confirm that he was "refusing to put anything in writing." (ROA.1659.) Espinoza's eagerness to conclude that Ramirez was being uncooperative or untruthful—at the cost of attempting to further confirm whether records had been compromised—suggests an illegitimate purpose. *See, e.g.*, *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998) (finding "clear indicia of discriminatory intent" where employer appeared disinterested in employee's explanations, as if already "intent on building a case against [the employee]"), *enforced*, 201 F.3d 592 (5th Cir. 2000).

In addition, the Board noted Espinoza's curious failure to confront Ramirez with the photographed text messages between Ramirez and Reichman or to allow him to explain what they meant. (ROA.1843-44.) Espinoza vaguely and unconvincingly testified that he deliberately chose not to let Ramirez see the text messages because the interview was about finding whether he "could trust somebody that is on one of our teams." (ROA.1065.) As an initial matter, that explanation contradicts the Company's primary assertion that it was focused on determining whether there had been an actual or attempted breach of confidential information. By not producing the text messages or specifically asking Ramirez what they meant, Espinoza more clearly evidenced a desire to entrap Ramirez into misstatements or alleged "dishonesty" about a brief text exchange that had

occurred months earlier. The failure to give Ramirez an opportunity to review and explain the ambiguous text messages in question is quintessential evidence that the Company was more concerned with "looking for any infraction by [Ramirez] that might ostensibly justify discharging [him]," rather than determining the truth regarding a possible breach of confidential data. *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 662-63 (5th Cir. 1967) (identifying "most damning" evidence of discriminatory motive as employer's failure to let employees "explain or give their versions of [disputed incident]").

As the Board further found, the Company's failure to ever follow-up with Reichman or to ask her to clarify the meaning of her own vague text messages similarly manifests a lack of genuine "concern about the investigation" or about the alleged theft of confidential information. (ROA.1843.) The Company's deliberate choice not to seek clarification from Reichman regarding her communications with Ramirez is particularly extraordinary, because her text messages to Ambroa make clear that she was eager to explain what had happened and to demonstrate to the Company that no records had been taken. (ROA.1486-95.) If the Company had been genuinely interested in protecting its confidential information, or in doing anything other than searching for a reason to discharge Ramirez, it beggars belief that the Company would not have at least spoken to Reichman once. *See, e.g.*, *NLRB v. Lancer Corp.*, 759 F.2d 458, 460-61 (5th Cir.

1985) (affirming finding of animus where employer discharged union supporter after "perfunctory investigation" and after making no attempt to consult other individuals with knowledge of alleged infraction, which the Board inferred was used by employer as "an excuse to rid itself of the union adherent"); *NLRB v. Baker Hotel of Dall., Inc.*, 311 F.2d 528, 533 (5th Cir. 1963) (affirming finding of animus where employer failed to ask other parties what had occurred and instead merely "surmise[d]" that employee had engaged in terminable misconduct). As with Espinoza's choice to withhold the text messages from Ramirez, it is reasonable to infer that the Company did not want to hear from Reichman during its investigation because her account might have undermined the Company's allegations of terminable misconduct by Ramirez. *See Cent. Freight Lines, Inc.*, 255 NLRB 509, 520 (1981) (noting, in support of unlawful-discharge finding, that evidence suggested "an invidious focusing by [the employer] on the appearance rather than the reality of what had happened, to give colorable validity to the discharge"), *enforced*, 666 F.2d 238 (5th Cir. 1982).

5. The Company's pretextual justifications for Ramirez's discharge support an inference of discriminatory motive

Finally, it is well established that the Board's finding of unlawful motive is reinforced where some or all of the employer's proffered explanations for its actions are found to be pretextual. *ADCO Elec.*, 6 F.3d at 119 ("Evidence which tends to suggest that the [employer's] stated reasons are pretext is relevant in

determining if an unlawful motive can be inferred."); *see Valmont Indus.*, 244 F.3d at 466 (noting that pretextual justifications may be used to infer discriminatory motive where "surrounding facts tend to reinforce that inference"). For the reasons discussed below, the Board reasonably found that the Company's justifications for its decision to discharge Ramirez were pretextual. Such finding not only bolsters all of the aforementioned evidence of animus and discriminatory motive, but it also precludes the Company from proving its affirmative defense under *Wright Line*.

C. The Board Reasonably Found That the Company Failed To Carry the Burden of Establishing Its Affirmative Defense

As shown above, substantial evidence supports the Board's finding that Ramirez's protected concerted activities were at least *a* motivating factor in the Company's decision to discharge him. The Board further found that the Company failed to prove that it would have discharged Ramirez in the absence of his protected conduct for any of the alleged infractions at issue—in particular, the allegations that he accessed confidential employee records, that he attempted to do so, or that he lied about doing so—because the Company's reliance on each of those allegations was pretextual. In other words, the Board reasonably found that such allegations were not the real reasons for the Company's decision to discharge him. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (noting that if an employer's stated justifications are found to be pretextual, "that is, either false or not in fact relied upon," the employer "fails by definition" to carry its *Wright Line*

defensive burden). Moreover, even if they were not pretextual, the allegations of misconduct that the Company continues to assert on review—that Ramirez asked Reichman about accessing other employees' wage information, and that he was evasive or dishonest in an interview with Espinoza—would not be sufficient to carry the Company's affirmative-defense burden under *Wright Line*. As the Board found, the Company failed to prove that it would have discharged Ramirez solely for such infractions in the absence of his protected concerted activities. (ROA.1844.) *See, e.g.*, *NLRB v. Associated Milk Producers, Inc.*, 711 F.2d 627, 630 (5th Cir. 1983) (discussing an employer's burden under *Wright Line*).

1. The Company's contemporaneous claim that Ramirez had accessed confidential employee records was pretextual

The Board first found pretext based on the Company's stated reliance, when discharging Ramirez, on the accusation that he had stolen or received confidential employee records. (ROA.1844.) Substantial evidence supports the Board's finding that the Company lacked any reasonable cause to believe such theft had occurred. Espinoza's contemporaneous assertions that the Company knew that Ramirez "had access to employee records" and that Ramirez was being fired in part for "accessing confidential employee records" (ROA.1660-61), and his overall approach to questioning Ramirez in September, make little sense in light of the investigatory timeline that the Company itself presented to the Board. At the unfair-labor-practice hearing, Espinoza testified that in late July he asked the

Company's IT department to look into whether any documents were taken, and that after receiving their report "a couple of weeks or so" later he concluded that none had been taken. (ROA.1041-43.) Accordingly, he had no reasonable basis at the time of Ramirez's discharge for asserting that Ramirez had accessed other employees' payroll records. Indeed, in its brief to the Court, the Company has now abandoned such claim by acknowledging that no files had been taken and, even more significantly, that the Company had reached such conclusion weeks prior to the decision to discharge Ramirez. (Br. 34-35; *see* ROA.1043, 1046.) Espinoza's stated reliance, at least in part, on that unfounded allegation was therefore pretextual. *Brookwood Furniture*, 701 F.2d at 468-69 (affirming unfair-labor-practice finding where employer contemporaneously cited alleged infraction despite no evidence of such infraction actually occurring).

2. The Company's factually erroneous claim that Ramirez asked his manager for access to other employees' wage information was pretextual

Having abandoned its contemporaneous claim that Ramirez improperly accessed confidential documents, much of the Company's brief to the Court is instead premised on the equally false assertion that Ramirez *attempted* to improperly access other employees' wage information by purportedly asking one of the Company's own managers to provide it to him.

As an initial matter, the Board found that such request simply never occurred. (ROA.1824-25, 1842-44.) Substantial evidence supports the Board's factual finding that Ramirez did not ask Reichman to provide him with any wage information other than his own, much less that he attempted to surreptitiously "steal" other employees' information or to acquire documents containing Social Security numbers. (Br. 14, 21.) The Board credited Ramirez's logical and uncontradicted testimony that he exclusively asked Reichman, in passing, to verify his *own* payroll records. (ROA.1842; ROA.1213-14.) The conversation in which such request occurred was followed by the text-message exchange that Ambroa later found and photographed, and that exchange fully corroborates Ramirez's credited testimony. In the text messages, Reichman asked Ramirez if he remembered when *he* started working for the Company at Churrascos River Oaks. (ROA.1481.) He responded by providing his own start date with the Company. (ROA.1483.) There is nothing else in the short exchange to indicate that Ramirez himself requested or had reason to request information pertaining to any other employee. The Company chose not to call Reichman as a witness at the hearing to offer her own account of her communications with Ramirez.

The only piece of evidence that the Company has identified as suggesting that Ramirez attempted to "steal" other employees' payroll records, or that the Company had reason to believe that he had, is a single text purportedly sent by

Reichman to Ambroa that the Board reasonably found insufficient to support the Company's position. (ROA.1825 n.18; ROA.1787.) According to the Company, Ambroa received a series of text messages from Reichman's phone number on the evening of July 26, shortly after Reichman had learned that Ambroa had fired her for drinking on the job.[12] One message stated: "Not only that I went Steven asked me if I can get other of peoples payrolls I told him it was illegal because of the fact that number one I wouldn't do it and number two he had other people's Social Security numbers on it." (ROA.1488.) The Board was not required to credit a disjointed, secondhand message over the sworn testimony of Ramirez and the corroborating documentary evidence indicating that he only ever asked Reichman about his own payroll records.[13] Even taken at face value, the messages do not prove that Ramirez attempted to surreptitiously acquire other employees' wage information or that the Company had reasonable cause to believe he had.

[12] Notably, since the Company deliberately chose not to call Reichman as a witness at the unfair-labor-practice hearing to verify the legitimacy of the text messages, it has not even demonstrated that Reichman personally sent them.

[13] The Company's contention that Ramirez "committed perjury" and that his testimony cannot be credited (Br. 19-20, 22) is frivolous. At most, Ramirez may have misspoken or misremembered a single statement—which was not materially relevant to the case—when recalling the details of a conversation that had taken place months earlier. (ROA.51; *but see* ROA.47.) This Court will not disturb the Board's credibility determinations based on witness testimony unless "inherently unreasonable or self-contradictory." *El Paso Elec.*, 681 F.3d at 665.

Moreover, the context of the messages makes them inherently non-credible. Far from being an unprompted admission, Reichman's texts reveal that the Company had *already* specifically accused her of taking information for Ramirez. (*See, e.g.*, ROA.1491-92 (". . . I didn't do all the things that you're accusing me of and no I did not do anything with Steven and I did not take any paperwork for Stephen."); *see also* ROA.1486-87.) The fact that the Company had already settled on its claim that Ramirez improperly asked Reichman to provide him with other employees' records even before receiving her message—despite, as noted above, the lack of any indication to that effect in Ramirez's text exchange with Reichman—merely reinforces the Board's finding of pretext.

In addition, Reichman had just learned that she had been fired by Ambroa, and the messages suggest that she was upset while sending them. The independent validity of anything alleged in the messages is therefore dubious. *See Charter Commc'ns, LLC*, 366 NLRB No. 46, 2018 WL 1522489, at *12 (Mar. 27, 2018) (finding pretext where employer credulously relied on aggrieved manager's accusations while ignoring his motives for bending truth and the likelihood he "may have hoped to use the complaint to gain job security"), *enforced*, 939 F.3d 798 (6th Cir. 2019). If anything, the messages could be read to suggest that Reichman was trying to ingratiate herself with Ambroa by distancing herself from Ramirez and his lawsuit, which would implicitly confirm the Company's internal

hostility toward Ramirez's protected concerted activity.[14] In sum, the Company cannot carry its burden of proving that it possessed a reasonable belief that Ramirez needed to be discharged based on its interpretation of Reichman's messages, because the Company inexplicably chose *to never follow-up with Reichman* or to ask her about what her vague messages meant—either prior to Ramirez's termination or during the unfair-labor-practice hearing.

In any event, as the Board explained in its vacated decision, incorporated by reference in the Supplemental Decision and Order on review, even a credulous reading of the text message relied on by the Company would still not support the Company's contention that Ramirez engaged in terminable misconduct or lost the protection of the Act. (ROA.1825 n.18; ROA.1787.) In pertinent part, Reichman's text message to Ambroa stated that Ramirez "asked [her] if [she could] get other [] peoples payrolls," and that Reichman told him that she could not and that it would be "illegal" for her to do so. (ROA.1488.) Thus, even if one were to fully adopt the Company's reading of Reichman's message, the most that the Company would have had reasonable cause to believe is that Ramirez "asked" Reichman whether she could obtain other employees' payroll records and that Reichman told him she could not. There is no evidence or allegation that Ramirez

[14] Likewise, the messages could be read to suggest that Reichman was attempting to assist Ambroa in laying the groundwork for the story that Ambroa had already settled on for getting rid of Ramirez.

pressed the issue, that he attempted to convince Reichman to obtain the information anyway, or that he tried to access employees' payroll records through other means. It also bears emphasizing that Reichman was one of the Company's *own managers*, and that Ramirez allegedly directed his hypothetical question to a representative of the Company to whom he continued to report while working at the Artista restaurant. Although the Company baselessly assumes or attempts to insinuate some form of conspiratorial relationship between Ramirez and Reichman, the evidence shows that the two were nor particularly close and were only communicating about the lawsuit in mid-July because Reichman reached out to Ramirez to ask about it. (ROA.122-23, 1209-10, 1213, 1662.)

In light of the above facts, and even taking Reichman's text to Ambroa at face value and crediting it for the sake of argument, the Board reasonably rejected the Company's affirmative defense that it would have discharged Ramirez in the absence of his protected conduct for allegedly attempting to misappropriate other employees' wage information. (ROA.1825 n.18.) As the Board explained, a mere inquiry by Ramirez to one of the Company's own managers would not have been a legitimate basis for termination. (ROA.1787.)[15] Moreover, as the rest of the

[15] Contrary to the Company's misrepresentations of the Board's decision in this case (Br. 26, 28-29), Board law is clear that a mere request is distinct from an actual attempt to obtain information surreptitiously. (ROA.1787.) As this Court has recognized, the Board has primary responsibility for balancing employees' right to pursue protected activities and their employer's right to maintain order, and

exchange between Reichman and Ambroa shows, the Company declined to follow-up or to clarify further, and instead Ambroa asked Reichman to stop texting him. (ROA.1490.) The Company's lack of curiosity about Reichman's vague message reinforces the Board's finding of a sham investigation. The Company also failed to present any comparable examples or other evidence to the Board suggesting, much less proving, that it normally would have discharged an employee for simply asking his or her manager a question, whether inappropriate or not.

3. The Company's claim that it discharged Ramirez for dishonesty and for lying about attempting to access other employees' information was pretextual

The Board also reasonably rejected as pretextual the Company's assertion that it would have discharged Ramirez for allegedly "lying about misconduct" (Br. 31) in the absence of his protected concerted activities. (ROA.1825 n.18, 1844.) The Company first insists that Ramirez lied about illicitly "attempting to obtain other employees' payroll [records]." (Br. 31-33.) That contention fails because, as discussed, Ramirez made no such attempt and the Company had no reasonable cause to believe that he had. Nor did the Company have reason to believe that Ramirez had specifically lied about Reichman's text messages to him concerning work records. To the contrary, the photographed messages show that the Company

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the Court will not disturb the Board's conclusions "unless illogical or arbitrary." *NLRB v. Allied Aviation Fueling of Dall. LP*, 490 F.3d 374, 380 (5th Cir. 2007).

must have known that Ramirez was being truthful when he denied having *sent* any texts to Reichman about flash drives or about copying records. (ROA.1656-59.)

On review, the Company shifts tactics and asserts that Ramirez "admitted" at the unfair-labor-practice hearing that he lied to Espinoza during the September interviews. (Br. 33.) The Company's assertion is premised on Ramirez's general acknowledgement on cross-examination that he had, in fact, spoken to Reichman about non-scheduling-related issues. (ROA.1196.) Not only is this new assertion distinct from the Company's prior assertions that Ramirez lied about *misconduct*, but the Company's overly literal interpretation of Ramirez's answers to Espinoza merely supports a finding of pretext. The obvious focus of Espinoza's questioning was whether Ramirez had communicated with Reichman about accessing "employees' private records" and about surreptitiously removing or deleting them. (ROA.1655-59.) In that context, Ramirez's denials and his assertions that he only ever texted Reichman about work-related issues were entirely reasonable. Even under the Company's erroneous theory that Ramirez and Reichman were engaged in misconduct, Ramirez would have had no reason to imply—and the Company would have had no reason to understand him as implying—that he had literally never spoken to his manager and coworker about *any* non-scheduling-related issue.

In any event, the Board found that any arguable misstatements or omissions by Ramirez in his interviews with Espinoza would not be not a legitimate basis for

sustaining the Company's *Wright Line* affirmative-defense burden, because Espinoza's questioning was intentionally designed to create a justification for discharging Ramirez rather than to investigate the truth. (ROA.1842-44.) Espinoza asked Ramirez misleading questions that did not reflect the actual contents of the text-message exchange, he prevented Ramirez from reviewing and explaining what the messages meant, and he consciously placed Ramirez in a compromising situation. (ROA.1843-44.) Espinoza already knew that no documents had been taken and that Ramirez and Reichman had been discussing the lawsuit against the Company, and yet he asked questions that forced Ramirez to either admit his role as the lawsuit's point person, or to conceal his off-work conversations and thereby provide the Company with fodder for pretextual claims of dishonesty. It is classic evidence of pretext for an employer to go out of its way to attempt to "catch [an employee] in a lie" by coercively questioning him or her about information the employer already possesses, because "[s]uch a tactic would hardly seem necessary" if the employer believed that legitimate misconduct was at issue. *Sanitary Laundry & Dry Cleaning Co.*, 171 NLRB 961, 962 (1968). Moreover, as this Court has held, an employer cannot evade unfair-labor-practice liability by citing false or evasive statements that an employee gave in response to questioning "inextricably involved" with the very protected conduct that the employer harbored animus toward. *NLRB v. Roney Plaza Apartments*, 597 F.2d

1046, 1051 (5th Cir. 1979); *cf. NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978-79 (5th Cir. 1982) (discussing analogous doctrine regarding insubordination provoked by unfair treatment).

Nor, despite asserting that it strictly enforces a "policy on honesty" (Br. 33), did the Company present any evidence to the Board demonstrating that it would have normally discharged Ramirez for a first offense of making a false or misleading statement unrelated to any other material misconduct. The record shows that the Company had previously only ever discharged employees for serious "dishonesty" involving actual thefts and attempted coverups. (ROA.1842; ROA.410-11, 1068-69, 1496-1500.) The Company's own managers described Ramirez as a "great server" (ROA.823), and there is no evidence of any prior infractions during his three years of employment. It was the Company's burden before the Board to prove that it would have discharged Ramirez in the absence of his protected lawsuit, and the Company failed to satisfy that burden by citing tenuous-at-best examples of alleged misconduct. That is particularly true to the extent the Company is now relying on an overly literal claim of a "dishonest" statement unrelated to any other material wrongdoing. As the Board explained (ROA.1844), the present facts are also distinguishable from the cases cited by the Company (Br. 31) in which employees were lawfully terminated for attempting to

conceal serious misconduct and for consciously lying during legitimate employer investigations.[16]

Accordingly, the Board reasonably rejected the Company's affirmative defense under *Wright Line* and instead concluded that Ramirez's alleged dishonesty, along with the Company's other contemporaneous allegations of misconduct, were utilized as pretextual excuses to rid the Company of the employee who was spearheading the growing collective action. (ROA.1825.) Substantial evidence supports that finding and the inferences drawn by the Board.

D. The Board Acted Within Its Discretion by Ordering the Company To Offer Ramirez Reinstatement and Full Backpay

Finally, there is no merit to the Company's separate argument that Ramirez is not entitled to reinstatement or backpay under the Act. (Br. 39-41.) The Board's choice of remedy is entitled to the "greatest deference" and will not be overturned unless shown to be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 720 n.7 (5th Cir. 2018).

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[16] Contrary to the Company, the Board did not rest its decision on a finding that employees are "entitled to lie" to their employers in similar circumstances. (Br. 31-32.) Rather, as shown above, the Board found that the Company's stated reliance on Ramirez's alleged dishonesty was pretextual and that, moreover, the Company failed to prove that it otherwise would have discharged a three-year employee with Ramirez's spotless disciplinary record for evasive answers given to avoid discussing an ongoing lawsuit against the Company.

The main premises of the Company's argument are that Ramirez "lied under oath" at the unfair-labor-practice hearing and that he "attempted to take confidential information from his coworkers." (Br. 39-40.) As previously discussed, pp. 43-48 & n.13, the Company's assertions are simply false. Substantial evidence supports the Board's finding that Ramirez never even asked Reichman for other employees' records, and there is no evidence that he consciously lied in his testimony. Even assuming, counterfactually, that Ramirez had in some discernible manner "lied under oath" at the unfair-labor-practice hearing (Br. 39), the Supreme Court has rejected the proposition that "false testimony of a former employee who was the victim of an unfair labor practice should always preclude him from winning reinstatement with backpay." *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 323-25 (1994); *see Blue Circle Cement*, 41 F.3d at 211. The cases cited by the Company (Br. 39-40) were decided prior to the Supreme Court having spoken in *ABF Freight* and, in any event, each case involved more serious misconduct than that alleged here. *E.g., Brookshire Grocery*, 919 F.2d at 365 (holding reinstatement improper where employee snuck into supervisor's office at night and surreptitiously stole confidential information, and then lied under oath about source of such information).

The Company then shifts to arguing for the first time on appeal that Ramirez is not entitled to a full remedy because, in response to cross-examination at the

unfair-labor-practice hearing, Ramirez purportedly "admitted that he lied to [Espinoza]." (Br. 40.) The Company did not present that distinct argument to the Board or otherwise argue that Ramirez's backpay should be cut off as of the date of the unfair-labor-practice hearing. Pursuant to Section 10(e) of the Act, the Court lacks jurisdiction to entertain any argument that was not presented to the Board in the first instance. 29 U.S.C. § 160(e); *In-N-Out Burger*, 894 F.3d at 720. In any event, the Company's duplicative argument is merely an attempt to revive its affirmative defense under *Wright Line*, which the Board rejected. Even when an employer properly alleges that backpay should be cut off due to newly discovered misconduct, the employer has the same burden to prove that the employee "engaged in unprotected conduct for which the employer would have discharged any employee." *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69-70 (1993), *enforced in relevant part*, 39 F.3d 1312 (5th Cir. 1994). The Company has failed to prove that it would have discharged another employee for the innocuous and debatable "dishonesty" that Ramirez allegedly admitted to.

Thus, the Board acted well within its broad remedial discretion by ordering the Company to offer Ramirez reinstatement and full backpay, along with the other remedial provisions in the Board's Order.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORDÚA RESTAURANTS, INCORPORATED	)	
Petitioner/Cross-Respondent	)	No. 19-60630
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 12th day of March, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CORDÚA RESTAURANTS, INCORPORATED Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	No. 19-60630

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Nos. 32(a)(7)(B), 32(a)(5) and 32(a)(6), the Board certifies that its proof brief contains 12,423 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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